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[JUN 13 1994  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

June 13, 1994

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: MM Docket No. 94-34  
Implementation of Commission's  
Equal Employment Opportunity Rules  
Barnstable Broadcasting, Inc.

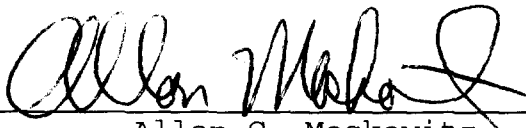
Dear Mr. Caton:

On behalf of Barnstable Broadcasting, Inc., we are filing herewith an original and four copies of its "Comments" to the Notice of Inquiry, FCC 94-103, regarding Implementation of Commission's Equal Employment Opportunity Rules.

Should any questions arise with respect to this matter, please contact the undersigned counsel.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By:   
Allan G. Moskowitz

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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JUN 13 1994

TELETYPE UNIT  
COMMUNICATIONS SECTION  
JUN 13 1994

In the Matter of

Implementation of Commission's  
Equal Employment Opportunity Rules

MM Docket No. 94-34

TO: The Commission

COMMENTS OF BARNSTABLE BROADCASTING, INC.

BARNSTABLE BROADCASTING, INC. (hereinafter referred to as "Barnstable"), by its attorneys, hereby submits its instant Comments in response to the Commission's Notice of Inquiry, FCC 94-103, released April 21, 1994, in this proceeding regarding the implementation of the Commission's Equal Employment Opportunity ("EEO") Rules. Barnstable is a broadcast group constituting Northland Broadcasting, Inc., licensee of Radio Station WHOM(FM), Mt. Washington, New Hampshire; OBC Broadcasting, Inc., licensee of Radio Stations WSLR(AM)/WKDD(FM), Akron, Ohio; WGNA Broadcasting, Inc., licensee of Radio Stations WGNA(AM)/-FM, Albany, New York; Quaker Broadcasting, Inc., licensee of Radio Station WWKL-FM, Harrisburg, Pennsylvania; KIX Broadcasting, Inc., licensee of Radio Station WGKX-FM, Memphis, Tennessee; Long Island Broadcasting, Inc., licensee of Radio Stations WHLI(AM)/WKJY(FM), Hempstead, New York; and KOOL Broadcasting, Inc., licensee of Radio Station WYKL(FM), Millington, Tennessee.

In support thereof, the following is respectfully shown:

## I. INTRODUCTION

1. As the licensee of AM and FM radio stations for the past 10 years, Barnstable has endeavored to seek out, hire and promote qualified employees of all races in a manner which would increase employment opportunities for minorities and women specifically. Affirmative action in the form of the Commission's EEO Rules are an organic part of Barnstable's personnel policies. We believe that the stations' operations, the quality of our personnel and our programming has benefitted from the diversity of our staff. To date, the implementation of the Commission's EEO Rules have provided a useful service to both the stations by providing a mechanism by which it could actively recruit qualified minority and female applicants, and to minorities and women by providing them increased access to broadcast employment opportunities.

2. However, we strongly believe that the Commission's recent Policy Statement revising its standards for assessing forfeitures for violations of the Broadcast EEO Rules<sup>1</sup> and the inflexible application of the new standard in the Commission's review of broadcast license renewal applications since the release of the Policy Statement is counter-productive, is an ex post facto and retroactive change in EEO processing guidelines and, finally, is a step backward by stressing "numbers" over "efforts."

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<sup>1</sup> Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, FCC 94-27, released February 1, 1994.

3. Prior to 1987, the Commission's enforcement of its EEO Rules focused on whether licensees met the Commission's processing guidelines regarding minorities and women overall and in the upper four job categories. In other words, the Commission relied on whether a station met "the numbers", i.e., whether the percentage of minorities and women on the station's staff was commensurate with the percentage of minorities and women in the available labor force in the station's area. However, in EEO Rules for Broadcasters, 63 RR 2d 220 (1987), the Commission changed its approach, "refocusing its concern on efforts rather than numbers." The Commission noted that:

Our assessment of a licensee's EEO performance will not be determined solely on the basis of quantitative tests. Rather, these guidelines will be used to ensure consistency in the initial review of station employment data. They should not be interpreted as quotas or numerical goals to which the licensee is subject and their use is not intended to imply that stations meeting the specific employment levels thereunder necessarily will be considered to have satisfied their EEO obligations . . . . Our discussion herein should be adequate to clarify that our policy with respect to evaluation of broadcaster's EEO efforts should not be interpreted to allow the use of the guidelines as either quotas or as a "safe harbor". Thus, we do not find it is necessary to adopt the proposal of DOJ and BFMA to qualify our use of these guidelines in our Rules. We believe that to do so would institutionalize the numerical processing guidelines contrary to their intended and our stated purpose. (emphasis added)

63 RR 2d at 235.

4. Between 1987 and the Commission's February 1, 1994 release of its new standards, the Commission followed its stated

policy emphasizing efforts rather than numerical goals. While the Commission's policy was at least theoretically feasible, as a practical matter it could not always be successfully executed by small stations, by stations in small markets, by stations on the fringes of larger markets, and in those other situations in which minority recruitment is extremely difficult. If, however, a station created and aggressively implemented an EEO program which complied with the Commission's Rules, could document strenuous efforts, yet still failed, to some degree, to hire minorities commensurate to their percentage in the area's population, a station could at least rely on the fact that it had done the best it could do to recruit and hire minorities and could rely on the documentation of its efforts for a fair review at the Commission.

5. However, the Commission's new enforcement policy re-embraces a quota system by quantifying "efforts". While the Commission strenuously rejected a "safe harbor" with respect to staffing, it has now instituted a "safe harbor" on recruitment, i.e., that a station must attract an adequate pool of minority/female applicants or hires for at least 66% of all vacancies during the license term. Whereas at least the previous processing guidelines had some relation to reality, the new "quota" of 66% of vacancies is wholly arbitrary in that it has no correlation to any demographic or societal factor. Moreover, the "adjustment criteria" merely exacerbate the situation by punishing stations for conditions beyond their control, such as high staff turnover, and/or being situated in areas where there is a large pool of minorities in the labor force, despite the

fact that the stations may have made extraordinary efforts to recruit minorities. Faced with these hurdles and the draconian sanctions of five figured forfeitures and short term renewals, one does not have to be of too cynical a turn of mind to envision that a market will arise for "professional" minority applicants to round out one's applicant pools so as to exceed the benchmark. Other stations may just give up completely!

6. Moreover, the Commission's application of its new compliance standards and criteria, which were only announced on January 31, 1994, to judge and punish licensees now for their actions during renewal periods which ended in 1990, 1991, 1992 or even 1993, as the Commission has been doing for the past several months, is absolutely unfair, let alone probably unconstitutional. No licensee in any service, in any size market, in any format, had any previous notice (or even a hint) that its applicant pools for two-thirds of its vacancies were required to contain minorities. Punishing licensees for not living up to expectations which they never dreamed were required of them cynically mocks the good faith efforts of all licensees who have endeavored to maintain a productive EEO program.

7. In sum, had the Commission merely increased its base forfeiture to \$12,500.00 as it did in Standards for Assessing Forfeitures, 69 RR 2d 823 (1991) and set forth adjustments based on criteria within the licensee's control (i.e., inadequate recordkeeping or insufficient efforts, etc.), we believe that licensees would have been sufficiently chastened to redouble their efforts to locate and recruit minority applicants. These

increased (and authentic) efforts would have produced viable results.

8. However, we are also convinced that the establishment of an arbitrary and, for many stations, unreachable standard of compliance will instead have the opposite effect of encouraging "window dressing" and chicanery on one hand or resignation and apathy on the other to the detriment of the minority community, broadcasters and the public.

## **II. COMMENTS**

### **A. Part-Time Hires**

9. The Commission should eliminate the requirement to document part-time hires for all broadcasters. The definition of full-time should remain at 30 minimum hours. We reject any expansion of the Commission's EEO enforcement or policy focus on part-time hires. First, the overall EEO reporting burden should be eliminated with respect to part-time hires as the Commission's primary focus is on full-time hires. Moreover, the Commission should not expand its consideration of part-time hires. The Commission's administrative burden on focusing on full-time hires alone has resulted in a three to four year process for the resolution of renewal applications.

### **B. Minority Business Development**

10. Broadcasters should not be required to encourage minority and female entrepreneurs to conduct business "with all parts of their operation." Economic development unrelated to broadcasting is obviously outside of the Commission's

jurisdiction and would not in any way "enhance access by minorities women to increased employment opportunities in the communications industry."

**C. Promotions and Retention**

11. The Commission's Broadcast EEO enforcement regarding the promotion and retention of minority and females is adequate. Presently, should a minority or female employee have a dispute with their broadcast employer regarding promotion and/or retention, they can avail themselves of their local Equal Employment Opportunity Commission ("EEOC") office and procedures. As the Commission knows, employees often do utilize the EEOC which licensees are required to report to the Commission.

**D. Inquiry Letters**

12. The Commission should, at worst, maintain the present standard inquiry letter which requests recruitment and hiring information for the last three years of the license term. Barnstable does not believe that information should be requested for the entire license term. The Commission would be inundated with more than double the detailed hiring data presently submitted which would further bog down the processing of applications.

**E. On-Site Audits**

13. The Commission should not supplement its renewal inquiry procedures by conducting on-site audits in any case because of the administrative burden and expense. If, however, the Commission determines it should conduct on-site audits, audits should be conducted only of those stations who have



received short term renewals and the audits should be informational and non-punitive.

**F. The Renewal Application**

14. The renewal application should be revised to request information only for full-time hires and should completely eliminate part-time hires. The renewal application should not be revised to request more detailed recruitment and hiring information. The additional hiring information suggested by the Notice of Inquiry is identical to that requested by the Commission's inquiry letters which the Commission estimates are only sent to approximately 1,740 of the 13,000 radio and television stations currently in existence. However, it takes the Commission staff approximately three to four years to process the staffing information of those stations sent inquiry letters. Obviously, if all stations had to submit that amount of information, the burden on the Commission staff, not to mention the stations themselves, would be onerous.

**G. Annual Employment Reports**

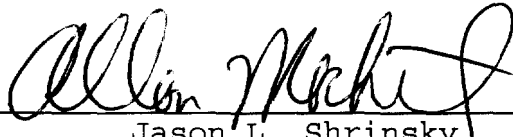
15. Employment information should not be collected for the same 15 job categories as now required for cable operators and MVPD's because the six additional job categories (corporate officers, general manager, chief technician, comptroller, general sales manager and production manager) can easily fit into the nine original categories used for radio and television and would contribute little additional information of value to the Commission which would offset the additional burden on licensees.

### III. CONCLUSION

16. Therefore, Barnstable Broadcasting, Inc. submits that the most valuable change that the Commission can make in its EEO Rules, policies and procedures, standards and guidelines to increase their effectiveness in promoting equality of employment opportunity in the cable and broadcast industries is to revisit and rethink its standards for assessing forfeitures for violations of the Broadcast EEO Rules.

Respectfully submitted,

BARNSTABLE BROADCASTING, INC.

By:   
Jason L. Shrinsky  
Allan G. Moskowitz  
Its Attorneys

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER  
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Suite 1100  
Washington, D.C. 20005  
(202) 682-3501

June 13, 1994

**CERTIFICATE OF SERVICE**

I, Diane E. Bateman, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, do hereby certify that a copy of the foregoing "Comments" was hand-delivered, this 13th day of June, 1994, to the following:

The Honorable Reed E. Hundt  
Chairman  
Federal Communications Commission  
1919 M Street, N.W.  
Room 814  
Washington, D.C. 20554

The Honorable James H. Quello  
Federal Communications Commission  
1919 M Street, N.W.  
Room 802  
Washington, D.C. 20554

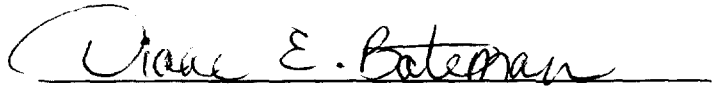
The Honorable Andrew C. Barrett  
Federal Communications Commission  
1919 M Street, N.W.  
Room 826  
Washington, D.C. 20554

The Honorable Rochelle B. Chong  
Federal Communications Commission  
1919 M Street, N.W.  
Room 844  
Washington, D.C. 20554

The Honorable Susan Ness  
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Diane E. Bateman